THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION NO.18038 OF 2000

(AND BATCH – 18370 AND 18660 OF 2000)

DATED 09.09.2005

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BETWEEN:

T.Venkateswara Rao, S/o Venkateswarlu

And others.

…PETITIONERS

AND

The Chairman, A.P.Cooperative Tribunal, Vijayawada,

And others.

…RESPONDENTS

THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION Nos.18038, 18370 and 18660 OF 2000

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COMMON ORDER:

This common order shall dispose of the three writ petitions. The petitioner at relevant time was working as Junior Inspector at Giddalur Cooperative Rural Bank (hereafter called, the Bank) from 09.10.1980 to 31.10.1987 except for a brief period of six months in 1982. The second respondent herein initiated proceedings under Section 60(1) of A.P.Cooperative Societies Act, 1964 (for short, the Act). A show cause notice dated 29.06.1988 was issued alleging that the petitioner fraudulently misappropriated funds during the year 1982-1983. The petitioner did not submit any representation. Therefore, by order dated 04.08.1988 (hereafter called, first surcharge order), the second respondent issued proceedings surcharging the petitioner in a sum of Rs.1,47,115/-. Aggrieved by the same, the petitioner filed O.A.No.48 of 1996 on the file of A.P.Cooperative Tribunal, Vijayawada (for short, the Tribunal).

The Deputy Registrar of Cooperative Societies, Markapur initiated another proceedings under Section 60(1) of the Act by issuing a notice dated 07.03.1988, based on a special report of the Senior Inspector/Auditor, Markapur, in which it was alleged that during the year 1982-1983, the petitioner fraudulently misappropriated a sum of Rs.3,63,368/-. The petitioner submitted explanation by way of representation. After considering the representation, by proceedings dated 15.04.1988 (hereafter called, second surcharge order), the Deputy Registrar of Cooperative Societies, Markapur directed the petitioner to pay a sum of Rs.3,63,368/-. Aggrieved by the same, the petitioner filed O.A.No.55 of 1997 on the file of the Tribunal.

The Deputy Registrar also initiated yet another proceedings based on the special report of the Senior Inspector/Auditor, Markapur, alleging that the petitioner misappropriated a sum of Rs.1,87,809-85 during the year 1984-1985. After issuing show cause notice, to which the petitioner did not give any explanation, the Deputy Registrar by proceedings dated 04.08.1988 (hereafter called, third surcharge order) directed the petitioner to pay a sum of Rs.1,87,809-85. Aggrieved by the same, the petitioner preferred an appeal being O.A.No.49 of 1996 before the Tribunal.

The learned Tribunal by common order dated 31.07.2000 dismissed all three appeals. Aggrieved by which, the petitioner filed the present writ petitions. W.P.No.18038 of 2000 is filed against the first surcharge order, W.P.No.18370 of 2000 is filed against the second surcharge order and other writ petition being W.P.No.18660 of 2000 is filed against the third surcharge order. In all the writ petitions, the Tribunal is arrayed as first respondent and the Deputy Registrar of Cooperative Societies is arrayed as second respondent.

In support of the writ petitions, the petitioner filed an elaborate affidavit. It is, however, not necessary to refer to the pleadings. Suffice to say that according to the petitioner, he is not guilty of any alleged misappropriation, that the enquiry

conducted by the Deputy Registrar is not in accordance with Section 60(1) of the Act, that the audit as required under Section 50 of the Act was not conducted for the period 1982-1987 and therefore the special report submitted by the Inspector of Audit could not have been basis for passing surcharge orders.

The second respondent filed counter affidavit, *inter alia,* stating that the District Cooperative Audit Officer has followed the required procedure to complete the audit of Giddalur Cooperative Rural Bank and that under Rule 45 it is the duty of the Committee to furnish all the financial statements within two months from the date of completion of cooperative year. It is further alleged that the petitioner did not submit the statements every year and that the petitioner handed over the records to the President only on 23.11.1987. It is, however, not denied that the surcharge order was passed based on the special report of the Auditor. It is however alleged that the copy of the audit report was supplied to the petitioner before passing surcharge order, and that the petitioner did not request supply of the copies earlier. It is further stated that the surcharge notice for the year 1983-1984 was served on the petitioner by affixing the notice to the door as he was not available at the house and the family members refused to take it.

Learned counsel for the petitioner in all the writ petitions, Sri V.Mallik, raised the following submissions. The second respondent did not conduct any enquiry as contemplated under Section 60 of the Act. Whenever surcharge proceedings are initiated under Section 60 of the Act based on the inspection report of the audit, without conducting a regular enquiry examining the witness, the same cannot be sustained. He placed strong reliance on the Division Bench Judgments of this Court in **Challa Sanyasinaidu v Deputy Registrar of Cooperative Society** (for short, **Sanyasinaidu** case), **Lankala Koderu Cooperative Rural Bank Limited v Ungarala Pullaiah Naidu** (for short, **Lankala Koderu** case) and **Hyderabad District Cooperative Central Bank v Cooperative Tribunal, Hyderabad** (for short, **Hyderabad District Cooperative Central Bank** case). It is next contended that the petitioner filed an application before the Cooperative Tribunal for summoning the relevant records. Though the Tribunal passed orders on 10.03.2000 to call for the records while dismissing the appeals filed by the petitioner, the Tribunal grossly erred in observing that the petitioner did not come with clean hands in spite of the fact that the second respondent herein did not produce the relevant records. The learned counsel, therefore, would urge that the order of the learned Tribunal is vitiated by misdirection in law. On merits, he would submit that even according to the second respondent, the petitioner refunded all the F.D.R. amounts and in the absence of any audit for five years, the second respondent could not have initiated surcharge proceedings.

The learned Government Pleader for Cooperation has produced the necessary file before this Court. He would urge that the petitioner was given notices in relation to three surcharge orders but the petitioner did not submit his explanation. Therefore, there was no necessity for second respondent to conduct detailed enquiry. He placed strong reliance on the decision in **M.V.R.Reddy v Deputy Registrar of Cooperative Societies** (for short, **M.V.R.Reddy** case).

Before considering the rival contentions, it may be noticed that Section 60 of the Act enables the Registrar to make an order requiring any person who is entrusted with the organization, affairs of management of the society directing such person to repay or restore the money or property, which is misappropriated or fraudulently retained. Such action can be initiated under Section 60 of the Act pursuant to audit under Section 50, or an enquiry under Section 51 or an inspection under Section 52 or 53 of the Act. Section 60 of the Act as such does not contemplate any detailed enquiry in the name of trial. Section 60(1) of the Act requires the Registrar to enquire into the conduct of such person or other servant in relation to certain allegations pursuant to audit or enquiry or inspection. The Division Bench of this Court in **Sanyasinaidu** case, was dealing with the case of surcharge proceedings pursuant to an inspection under Section 52 of the Act. Interpreting Section 52 and Section 60(1) of the Act, the Division Bench held as under.

> On the contrary, Section 60 clearly contemplates an opportunity being given to the delinquent by making a representation. In our view, this is the proper occasion where the officer or the servant has to be given an opportunity of explaining his stand and allow him to participate in the enquiry before a final order is passed. This is a valuable right given to the delinquent which cannot be brushed aside in a routine manner. After the show-cause notice is served and an explanation is called for, an opportunity should be given to the affected person to cross-examine the witnesses examined in the course of enquiry under Section 52 or permit him to examine his witnesses to rebut their evidence. Until this is done the spirit of making a representation, as contemplated under Section 60 cannot be fulfilled. Although Section 60 does not prescribe any particular procedure before passing surcharge order, nonetheless, it is mandatory that principles of natural justice shall be followed in the enquiry. Evidence recorded behind the back of the defaulter cannot be relied upon to fasten the liability on him without giving him an opportunity to cross-examine the witnesses.

In **Lankala Koderu** case, this Court was concerned with an enquiry under Section 51 of the Act. This Court again applied the same principle laid down by the Division Bench in **Sanyasinaidu** case. In **Hyderabad District Cooperative Central Bank** case, this Court followed the decision in **Sanyasinaidu** case and observed that the enquiry/inspection report made under Section 50 or Section 51 of the Act can only be the basis for initiating surcharge proceedings but it cannot be made the basis for passing surcharge order. This Court, therefore, ruled that the detailed enquiry has to be conducted giving full opportunity to all those against whom proceedings are initiated.

In **M.V.R.Reddy** case, a learned single Judge of this Court took a different view. It was held that where an independent enquiry is initiated giving opportunity to the persons to be surcharged and when such person did not raise any objection nor submit any explanation, necessary orders can be passed under Section 60(1) of the Act based on the record available before the authority prepared under Section 52 of the Act. The relevant observations made therein are as follows.

> I am of the considered opinion that even the aforesaid two judgments may not render any assistance to the submissions made on behalf of the petitioner. Here is a case, where an independent enquiry has been initiated under Section of the Act and reasonable opportunity was afforded to the petitioner, proceedings were repeatedly adjourned at the instance of the petitioner and yet the petitioner has chosen not to submit his explanation. There was no other material before the authority concerned, except the material on record made available to the authority prepared under Section 52 of the Act. The material could definitely constitute reason for initiating action. Even the show-cause notice dt.25-8-1990 does not say as to why the order of surcharge should not be passed against the petitioner, as he is found responsible for mis-appropriation of the funds of the society in terms of Inspection report under Section 52 of the Act. The show-cause notice, on the other hand, gives details of the amounts alleged to have been mis-appropriated by the petitioner. Nothing prevented the petitioner to raise an objection and no reason is forthcoming from the petitioner as to why he had failed to peruse the records in spite of an opportunity given to him. The conduct of the petitioner suggests that he was making an attempt for eternal postponement of the proceedings initiated against him under Section 60 of the Act. The material available on record against the petitioner, including the Inspection report prepared and submitted under Section 52 of the Act could not have been ignored by the Registrar and the same was taken into consideration and rightly so, in my considered opinion, the petitioner could have satisfied the Registrar as to why such material should not be taken into consideration. Having failed to do so, the petitioner cannot be allowed to raise hue-and-cry in this writ petition. Fairness is not one way affair.

In this case, it is not denied that the petitioner submitted explanation to the show cause notice issued on 07.03.1988 (second surcharge notice) and he did not submit the explanation to the first surcharge notice and third surcharge notice. Be that as it is, before the Tribunal the petitioner contended that he has handed over all the records on 23.11.1987 to the President of the Bank who relieved him and that at that time no objection was raised nor any defects were pointed out in the accounts of the Bank. He also urged before the Tribunal that no audit was conducted at any time during 1982-1987. Presumably to support such view, the petitioner filed a miscellaneous petition being M.P.No.22 of 2000 to summon the relevant records. The second respondent did not file any counter affidavit in spite of the learned Tribunal granting adjournments five times. Therefore, on 10.03.2000, the Tribunal directed to call for the records and in spite of the same, records were not produced. Curiously, the Tribunal did not even advert to this aspect of the matter. As rightly pointed by the learned counsel for the petitioner in stead of drawing adverse inference against the second respondent Bank for not producing the records, observed that the petitioner approached the Tribunal with unclean hands. This is certainly misdirection in law.

The appeal provided to the Tribunal under Section 76 of the Act is an appeal on the question of fact as well as question of law. Except the surcharge notice and surcharge order passed by the second respondent, the Tribunal was not having any record before it. Though the records were summoned, losing sight of the same the Tribunal proceeded to dispose of the matter. This has certainly caused prejudice to

the petitioner, which would amount to grave error apparent on the face of record. Be it noted, in these proceedings for surcharge, ordinarily, this Court would be slow to re-appreciate the factual controversy in spite of the fact that the learned Government Pleader produced entire record before this Court.

These writ petitions are allowed and remitted back to the Tribunal for fresh disposal after getting the record from the second respondent, which was already summoned by order dated 10.03.2000 in M.P.No.22 of 2000. After summoning the record, the matter shall be disposed of within a period of two months therefrom. There shall be no order as to costs.

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(V.V.S.RAO,J)

09.09.2005.

pln

Note: Issue CC by 14.09.2005.

(By order)

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